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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1033

[Docket No. AO-11-0333; AMS-DA-11-0067; DA-11-04]

Milk in the Mideast Marketing Area; Recommended Decision and Opportunity to File Written Exceptions on Proposed Amendments to Tentative Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; recommended decision.

SUMMARY: This decision recommends adoption of a proposal to amend the Pool Plant provisions of the Mideast Federal milk marketing order to reflect that distributing plants physically located within the marketing area with a Class I utilization of at least 30 percent, and with combined route disposition and transfers of at least 50 percent distributed into Federal milk marketing areas, would be regulated as a Pool Distributing Plant under the terms of the order.

DATES: Comments must be submitted on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: All comments received will be posted without change, including any personal information provided. Comments (four copies) must be filed with the Hearing Clerk, United States Department of Agriculture, STOP 9200-Room 1031, 1400 Independence Avenue, SW, Washington, DC, 20250-1031. Comments may be submitted for public viewing using the electronic process available at the Federal eRulemaking portal: http://www.regulations.gov. Reference should be made to the title of the action and docket number.

FOR FURTHER INFORMATION CONTACT: Erin C. Taylor, Order Formulation and Enforcement Division, USDA/AMS/Dairy Programs, STOP 0231-Room 2963, 1400 Independence Ave, SW., Washington, DC 20250-0231, (202) 720-7183, e-mail address: erin.taylor@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This decision recommends adoption of amendments that will more adequately define the plants, and the producer milk associated with those plants, that serve the fluid needs of the Mideast market and therefore which producers should share in the additional revenue arising from fluid milk sales.

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674) (the Act), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c (15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the U.S. Department of Agriculture (USDA or Department) would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review USDA's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities.

For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. For the purposes of determining which dairy farms are "small businesses," the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farms. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During October 2011, the time of the hearing, there were 6,651 dairy farms pooled on the Mideast order. Of these, approximately 6,169 dairy farms (or 92.8 percent) were considered small businesses.

During October 2011, there were 51 handler operations associated with the Mideast order (25 fully regulated handlers, 8 partially regulated handlers, 2 producer-handlers and 16 exempt handlers). Of these, approximately 38 handlers (or 74.5 percent) were considered small businesses.

The Pool Plant provisions of the Mideast order define which plants have an association with serving the fluid milk market demand of the Mideast marketing area, and therefore determine the producers and the producer milk that can participate in the marketwide pool and share in the Class I market revenues. The proposed amendments could fully regulate handlers that currently fall under partial regulation. As a result, these handlers would be required to account to the Mideast order marketwide pool. Consequently, all producers whose milk is pooled and priced under the terms of the Mideast order would benefit from the additional revenue contributed to the marketwide pool by the newly-regulated distributing plant. The Department anticipates that while these additional monies would be shared with all producers serving the market, the proposed amendments would not have a significant economic impact on a substantial number of small entities.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that the proposed amendment would have no impact on reporting, recordkeeping, or other compliance requirements because it would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This recommended decision does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the approved forms are routinely used in most business transactions. The forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities.

Prior Documents in this Proceeding:

Notice of Hearing: Issued September 2, 2011; published September 8, 2011 (76 FR 55608).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Mideast marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, STOP 9200-Room 1031, 1400 Independence Ave, SW., Washington, DC 20250-9200, by [Insert date 60 days after publication in the **Federal Register**]. Four copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the Office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)). The hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. Some evidence was received that specifically addressed these issues and some of the evidence encompassed entities of various sizes.

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the Mideast marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The proposed amendments set forth below are based on the record of a public hearing held in Cincinnati, Ohio pursuant to a notice of hearing issued September 2, 2011. At the hearing, evidence was also gathered to determine whether market conditions exist to warrant consideration of the proposal on an emergency basis.

The material issues on the record of hearing relate to:

1. Amendment of the Pool Plant Definition

Findings and Conclusions

This decision recommends adoption of a proposal, published in the Notice of Hearing as Proposal 1, with two modifications: one proposed at the hearing and one conforming change made by AMS. Proposal 1, as published, would amend the Pool Plant provisions of the Mideast order so that any plant physically located within the marketing area would be fully regulated by the Mideast order if 50 percent of the plant's total combined route disposition and transfers falls within Federal milk marketing area boundaries and not more than 25 percent of the plant's route disposition is within any single Federal marketing area. This decision recommends striking the 25 percent in-area route disposition qualifier from the initial proposal, as proposed by Superior

Dairy, Inc. (Superior Dairy) during the hearing. As such, any distributing plant physically located in the Mideast milk marketing area with combined total route distribution and transfers of 50 percent or more into Federal milk marketing areas would be regulated by the terms of the Mideast order. (As discussed below, a plant meeting this new standard could still become pooled by another order if it has total route distribution of at least 50 percent into one Federal marketing area for 3 consecutive months (as provided for in §1033.7(h)(3)).) Additionally, the regulatory text recommended in this decision has been modified by AMS to add clarifying text to ensure consistency with current order provisions.

The Pool Plant provisions of the Mideast order define how plants demonstrate an adequate association with the fluid market, and therefore the milk associated with those plants that is pooled and priced under the terms of the order. The Pool Distributing Plant standard of the Mideast order first requires a plant to meet a minimum Class I utilization, which is the percentage of fluid milk physically received at the plant that is distributed or transferred as Class I (fluid) products. The Class I utilization standard for the Mideast Federal Milk Marketing Order (FMMO) is 30 percent. The plant must also show a reasonable association with the order's Class I market; that association is determined by the percentage of the plant's total Class I route disposition that is distributed or transferred within the marketing area, or "in-area" route disposition. In the Mideast order, 25 percent of the plant's Class I route disposition must be to outlets within the Mideast marketing area. If a plant meets both the 30 percent Class I utilization and the 25 percent "in-area" route disposition standard the plant will be a fully regulated distributing plant. Once fully regulated, a distributing plant must account to the marketwide pool at classified use values and pay its producers at least the order's minimum blend price.

A witness appeared on behalf of the proponents of Proposal 1, Dairy Farmers of America, Inc., Continental Dairy Products, Inc., Dairylea Cooperative Inc., Erie Cooperative Association, Foremost Farms USA Cooperative, Inc., Michigan Milk Producers Association, Inc., National Farmers Organization, Inc., Prairie Farms Dairy, Inc., and White Eagle Cooperative Association (collectively referred to as DFA et al.), in support of modifying the Pool Plant provisions of the Mideast milk marketing order. The witness stated that DFA et al. are all member-owned Capper Volstead cooperatives that collectively market the majority of the milk in the Mideast milk marketing area.

The DFA et al. witness estimated that more than 85 percent of the nearly 6,974 producers whose milk is pooled on the Mideast order are small businesses. The witness was of the opinion that the disorderly marketing conditions resulting from what they consider to be inadequate Pool Plant provisions are harming these small businesses and that failing to address these issues would be detrimental to their dairy farmer members.

The DFA et al. witness testified that the intent of FMMOs are to create and preserve orderly marketing conditions by, among other things, maintaining classified pricing and a marketwide pooling system in which all handlers pay uniform minimum classified prices based on their milk utilization and producers receive a minimum uniform blend price. The witness testified that when marketwide pooling and classified pricing are jeopardized, FMMOs should be amended to maintain order in the market.

The DFA et al. witness explained why they proposed a change to the Pool Plant provisions of the Mideast order. The witness testified that a large fluid milk bottling plant owned by Superior Dairy, located in Canton, Ohio, which had previously been fully regulated by either the Mideast or Northeast Federal milk orders, was able to become partially regulated under the current provisions of both orders. The witness testified that Superior Dairy's Canton plant was able to avoid full regulation by transferring packaged product ultimately bound for distribution in the Northeast marketing area through a smaller sister plant located in Wauseon, Ohio, thereby reducing the route disposition from its Canton plant below the 25 percent in-area route disposition requirement.

The DFA et al. witness was of the opinion that the Pool Plant provisions of the Mideast order allow Superior Dairy to avoid full regulation and consequently cause disorder in the market in two primary ways: 1) producers who incur the additional costs of servicing the order's Class I market are not guaranteed a uniform blend price, and 2) similarly situated handlers are not assured the same raw milk costs. The witness reviewed the producer payment options available to partially regulated plants and explained how the ability of plants like Superior Dairy's plant to avoid full regulation causes disorder. The witness elaborated that one of the producer payment options, commonly known as the "Wichita Option," for partially regulated plants requires plants to pay its producer suppliers, in aggregate, minimum Federal order classified values. The witness noted that while a Partially Regulated Distributing Plant (PRDP) has to pay aggregated classified values to it producers, it is not required to pay its producers uniformly on an individual basis. The witness said that if a plant demonstrates to the Market Administrator that this aggregate value requirement is met, then no additional payment into the order's producer settlement fund (PSF) is necessary. The witness testified that when partially regulated plants opt to pay their producer suppliers the minimum Federal order classified values, in aggregate, the plant can include over-order premiums in that calculation, whereas a fully regulated handler cannot. In orders such as the Mideast order, where significant over-order premiums are necessary to obtain a milk supply, the witness noted, this cost savings could be significant for a plant. The witness said that this savings could be used by the plant to increase market share for fluid milk sales, or procure additional milk supplies to gain a competitive advantage with similarly situated, fully regulated pool handlers who are required to pay classified milk use values to the PSF (not including over-order premiums) and minimum blend prices to dairy farmers.

The DFA et al. witness attempted to estimate the amount of money that Superior Dairy was able to retain from January of 2010 to July of 2011 by avoiding full regulation on the Mideast order. The witness was of the opinion that Superior Dairy was able to retain approximately $0.93 per hundredweight (cwt) on average, the potential "advantage" over fully regulated handlers, equal to a cumulative monthly total savings averaging just under $289,000 (based on an assumed monthly plant volume of 30 million pounds). The witness added that a similarly situated fully regulated handler would have paid this money into the order's PSF to be shared with all producers servicing the market. However, Superior Dairy's partially regulated status allowed it to retain the money and, as a result, minimum blend prices to all the Mideast order's pool producers were reduced.

The DFA et al. witness asserted that, over the years, Federal orders have been amended to reduce the disorder resulting from plants being regulated in areas different from the area in which they procure milk. The witness referred to a 1988 decision, "Milk in the Ohio Valley and Louisville-Lexington-Evansville Marketing Areas" (53 FR 14804), that amended Pool Distributing Plant standards to correct a disorderly marketing condition which caused similarly situated plants within the same competitive area to have different raw milk costs. In this case, a plant that was located in the Louisville-Lexington-Evansville marketing area, but had most of its route disposition in another marketing area, was regulated by the Louisville-Lexington-

Evansville marketing order. This change was premised on the idea that a plant should be regulated in the marketing area in which there is a reasonable assurance that it will have available an adequate supply of producer milk, which therefore promotes uniformity of prices to producers within the procurement area of the plant. The witness stated that the market disorder created by Superior Dairy's partially regulated status is similar to the issues addressed in the referenced 1988 Decision, and again urged the Department to recommend the adoption of Proposal 1 as an appropriate solution.

The DFA et al. witness concluded by requesting that the Department consider this proposal on an emergency basis. The witness said that DFA et al. supplies milk to both Superior Dairy and other fully regulated plants. According to the witness, the difference in regulatory status between its buyers causes disorderly marketing conditions that directly impact its members. Additionally, Superior Dairy's competitive advantage due to its partially regulated status lowers the value of the order's marketwide pool, thereby reducing the minimum blend price to all the order's producers each month that Superior Dairy is not fully regulated.

A second witness appeared on behalf of DFA et al. in support of Proposal 1. The witness reiterated the testimony of an earlier witness concerning the disorderly marketing conditions resulting from the Superior Dairy Canton plant becoming partially regulated. The witness said that the Department had taken steps in the past to restore order within the markets when there was evidence of plants engaging in uneconomic milk shipments and other business practices solely to avoid becoming fully regulated. The witness referenced regulatory changes made as a part of Federal order reform that closed loopholes that could be used to avoid regulation. Specifically, the witness highlighted amendments that prevented plants from using diverted milk volumes as part of the calculation used to determine eligibility for pooling.[1] The witness implied that the Department addressed this loophole to help maintain an orderly market.

A witness representing Dairy Farmers of America (DFA) appeared in support of Proposal 1. The witness purported to have first-hand knowledge of the Wauseon, Ohio, plant before it was purchased by Superior Dairy. The witness testified that the plant had been closed by two prior owners who found the facility to be inefficient and economically nonviable. The witness claimed that the facility was the smallest in the region and that no other plants of similar size and/or logistical constraints existed in the area. The witness described in detail what they perceived to be logistical complications resulting from the limited size of the Wauseon plant. These complications, the witness asserted, were evidence that the plant was being used by Superior Dairy to facilitate the uneconomic movement of milk in an attempt to avoid regulation. The witness acknowledged that they had not entered into the Wauseon plant since Superior Dairy's acquisition of the facility and had no knowledge of Superior Dairy's internal business processes.

A witness appeared on behalf of Michigan Milk Producers Association, Inc. (MMPA) in support of Proposal 1. MMPA is a member-owned Capper Volstead cooperative which pools the majority of its producer milk on the Mideast order. The witness stated that MMPA was a supporter of Federal orders in that they provide equality for producers and an orderly market for handlers.

The MMPA witness stated that the change in regulatory status of Superior Dairy's Canton plant was a concern that raised questions of competitive equity between similarly situated handlers. The witness also referenced an earlier witness' testimony that included an

[1] 64 FR 16025

analysis revealing a possible competitive advantage that a partially regulated plant could capture in addition to examining the degree of inequity that could exist amongst similarly situated plants.

The MMPA witness was of the opinion that Superior Dairy's purchase of a smaller distributing plant approximately 200 miles away in Wauseon, Ohio, was a business decision made to avoid full regulation under Federal orders by transferring packaged product from the larger Canton plant northwest to the smaller Wauseon plant and later transporting this product back east to its final destination. The witness stated that this uneconomic movement of product was an attempt to avoid full regulation of the larger distributing plant.

A witness from the Southern Marketing Agency (SMA) spoke in support of Proposal 1. SMA is a Capper-Volstead marketing agency comprised of seven cooperative members operating in the southern United States. The witness explained that Superior Dairy was unique from other handlers due to its broad distribution footprint which spanned the Northeast, Appalachian, Florida, Southeast, Central, and Mideast milk marketing areas. The witness opined that few other handlers of conventional fluid milk products had such expansive route disposition. The witness asserted that Superior Dairy was in direct competition with other Mideast fully regulated handlers for farm milk supplies.

The SMA witness testified that recent shifts in the manner of Federal order regulation of Superior Dairy has created market disorder. The witness testified that when a large bottling plant is able to escape full regulation by the order from which its raw milk supply is procured and utilized at the plant, dairy farmers and cooperative associations face difficulties in raw milk procurement planning. The witness explained how seasonal changes in demand for Class I milk products create the need for each plant to maintain a reserve supply to ensure that their Class I needs are always met. The witness said that cooperatives routinely schedule milk deliveries into certain plants to ensure that reserve requirements are met and producers remain qualified to participate in the order's marketwide pool. The witness described how the pooling of necessary reserve milk supplies is complicated when a large plant such as Superior Dairy changes its regulatory status, or regulated by a Federal order distant from its milk procurement areas. The witness further explained that because pooling requirements vary between orders, a situation can arise where a plant switches the order it is regulated on, but producers who normally supply and are pooled by the plant are not automatically qualified to be pooled on the new order. The witness explained how this misallocation of reserve supplies to handlers could unintentionally leave producers who regularly bear the cost of supplying the Class I market excluded from the order's marketwide pool.

The SMA witness testified that the pooling of a plant in an order distant from the plant's physical location creates market disorder. The witness explained how the Department uses "lock-in" type provisions to address the wide route disposition patterns of extended shelf life (ESL) products. The witness testified that Federal orders regulate plants that manufacture ESL products in the order that the plant is located, regardless of where the majority of milk is sold. The witness testified that the pooling of ESL manufacturers in this manner prevents market disorder that would result from the plant switching regulation between orders. The witness opined that similar regulation of plants similar to Superior Dairy would prevent disorderly marketing conditions.

The SMA witness asserted that Superior Dairy has a clear advantage over its fully regulated competitors since it is able to avoid payments into any PSF under partial regulation. The witness testified that the uneconomic movement of milk from Superior's Canton facility west to its Wauseon facility for subsequent distribution in the Northeast order was designed to limit the route disposition of Superior's Canton plant into any marketing area, thereby avoiding full regulation. The witness testified that this practice should be prohibited to prevent the potential for further disorderly marketing conditions.

A witness testifying on behalf of Superior Dairy, Inc. spoke in opposition to Proposal 1. According to the witness, Superior Dairy is a handler of Class I fluid milk products processing about 40 million pounds of milk per month at its two facilities. The witness argued that the change in regulatory status of Superior Dairy between the Northeast and Mideast FMMOs and between partial and full regulation does not disrupt marketing conditions in sufficient measure to warrant regulatory change.

The Superior Dairy witness said the majority of milk processed by the company is supplied by DFA. The witness testified that DFA charged PRDPs such as Superior Dairy classified prices plus an over-order premium based on the plant's raw milk utilization, as per industry practice. The witness noted that the company had an 82 percent Class I utilization and approximately 90 percent of its route distribution was in Federal milk marketing areas. The witness testified that Superior Dairy was regulated by the Mideast order until March 2010, the Northeast order from April 2010 to February 2011, and partially regulated on both orders since March 2011.

The Superior Dairy witness testified that the company was able to increase sales in recent years by implementing new packaging technology. The witness testified that the new packaging technology allowed the company to gain large clients whose distribution networks were substantially larger than that of traditional buyers. The witness noted that the result of that growth was increased sales into, and subsequent regulation by, the Northeast milk marketing order in April 2010. The witness explained that Class I sales to outlets within the boundaries of the Northeast marketing area increased to 28 percent of total Class I volume sold, which decreased the percentage of its Class I sales within then Mideast marketing area to around 20 percent. The witness testified that regulation on the Northeast marketing order required that Superior Dairy pay into the Northeast PSF, rather than the Mideast PSF, which in turn required a larger monthly pool obligation to the plant. The witness elaborated that the change in regulation from the Mideast order to the Northeast order harmed Superior Dairy's producers since the Northeast blend price, when adjusted to their location in Canton, Ohio, was $0.13 per cwt lower than the Mideast blend price. The witness said that this required Superior Dairy to increase the over order premiums paid to its Mideast raw milk suppliers to remain competitive while also paying into the Northeast PSF, thus increasing its total raw milk procurement costs. The witness noted that Superior Dairy preferred to be regulated by the Mideast order, rather than the Northeast, but was unable to expand their route distribution sufficiently in the Mideast marketing area to remain regulated by that order.

The Superior Dairy witness explained how the Canton plant came to be partially regulated as opposed to being fully regulated on the Northeast or Mideast order. The witness testified that the company purchased a small plant in Wauseon, Ohio in early 2011. The witness affirmed that the addition of this facility allowed Superior Dairy to decrease route distribution from its Canton plant to below 25 percent in both the Northeast and the Mideast marketing areas, allowing it to become partially regulated on both orders. The witness also added that the new facility was of interest to the company in that it allowed them to expand its procurement area for raw milk into Western Ohio and Southern Michigan without adding administrative personnel.

The Superior Dairy witness testified that one of the Federal order provisions available to handlers with limited route disposition into Federal order areas, sometimes referred to as the

“Wichita Option,” requires handlers to pay dairy farmers, in aggregate, the Federal order minimum classified values. The witness argued that the partial regulation of Superior Dairy does not provide any competitive sales advantage over its fully regulated competitors. However, the witness said that Federal order provisions for PRDP do not promote equity amongst dairy farmers since the price received by dairy farmers for raw milk sold to a partially regulated plant can differ from the price of milk sold to a fully regulated plant. The witness testified that if a handler is partially regulated under the “Wichita Option,” they essentially operate as an individual handler pool. The witness explained how producers who ship milk to a PRDP with a higher than market average Class I utilization can receive a higher price than producers who ship milk to a fully regulated plant and are in turn paid the order’s minimum blend price. The witness testified that Superior Dairy’s producer suppliers are, in fact, paid an “in-plant” blend price that is higher than the Mideast blend price. The witness further added that producers are in fact not harmed when a partially regulated plant is supplied by a cooperative (as is the case with Superior Dairy), as the cooperative (and its producer-members) then receive the higher in-plant blend price. The witness also said that these blend price differences have not caused market disorder since other Mideast fully regulated distributing plants have continued to receive an adequate supply of milk.

The Superior Dairy witness explained how adoption of Proposal 1 would harm its own independent producer suppliers. The witness testified that Superior Dairy purchases raw milk from approximately 120 independent producers, most of which are small businesses. Those producers, noted Superior Dairy’s witness, receive an in-plant blend price for their raw milk greater than the Mideast order blend price. The witness asserted that the price the independent producers receive for their raw milk would decrease should the Superior Canton facility be fully regulated because the Superior Canton plant would be required to account to the PSF for its Class I sales and that additional revenue would then be shared with all producers servicing the market, not just Superior Dairy's independent producer suppliers.

The Superior Dairy witness testified that Proposal 1 should not be adopted and its Canton, Ohio, plant should remain partially regulated. However, the witness said, should the Department decide to fully regulate either the Canton or Wauseon plant, it would prefer that both plants be regulated on the Mideast order. The witness noted that provisions exist in certain orders allowing plants producing ESL products to be locked into regulation on an order by virtue of geographic location rather than route distribution. The witness stated that since the route disposition patterns of Superior Dairy are similar to plants producing ESL products, it is reasonable to regulate Superior Dairy based on geographical location, not route disposition.

Accordingly, the Superior Dairy witness offered two separate modifications to Proposal 1 that the witness believed would lock Superior Dairy's Canton plant into regulation on the Mideast order. The witness suggested that Proposal 1 be modified by removing the 25 percent in-area route disposition qualifier so that plants physically located in the Mideast order with route disposition and transfers of at least 50 percent into Federal marketing areas would be regulated on the Mideast order. Alternatively, the witness suggested modifying Proposal 1 so that plants located in the Mideast order that have route disposition and transfers of at least 50 percent into any Federal market orders and sales into at least four separate marketing areas would be regulated on the Mideast order.

The Superior Dairy witness disputed multiple times the data assembled and analyzed by the DFA et al. witness. The Superior Dairy witness explained that the data used by DFA et al. in its analysis did not, among other things, address over-order premiums paid by Superior Dairy to their producer suppliers.

The witness from Superior Dairy was of the opinion that there was no need for the Department to consider this measure under emergency rulemaking procedures.

A post-hearing brief was submitted on behalf of DFA et al. reiterating their testimony that inadequate Pool Plant provisions in the Mideast order are causing disorderly marketing conditions and that a large fluid milk bottling plant should not be able to avoid full regulation by transferring fluid milk products between plants. The brief claimed that when using the analysis introduced in their testimony, the cost advantage to a hypothetical PRDP of similar size to Superior Dairy (a monthly plant volume of 40 million pounds) averaged $373,000 per month from January 2010 to July 2011. The brief reiterated that because Superior Dairy can include over-order premiums in its theoretical pool obligation calculation, this can amount to a large cost advantage to the plant. The brief explained that by Superior Dairy avoiding payments into the PSF, producer price differentials, on average, were reduced by approximately $0.028 per cwt in the Mideast order or $0.018 per cwt in the Northeast order, depending on how the plant was regulated. The brief also reinforced the SMA witness' testimony regarding the disorder created in the pooling of reserve supplies by a plant changing regulatory status from one order to another. The brief also emphasized the importance of market-wide pooling and uniform producer and handler values and stated that these fundamentals are undermined if major participants in the market can avoid regulation.

In brief, DFA et al. wrote that they were in support of the first alternate proposal offered at the hearing by Superior Dairy. The brief stated that the alternate proposal would resolve the market disorder that was the catalyst for the hearing request and that DFA et al. considers this the best option for producers supplying the fluid milk needs of the Superior Dairy Canton facility and Mideast marketing area as a whole. The brief stated that while typically a plant is regulated according to its route distribution, there have been exceptions made in order to regulate plants based on their procurement area. In these instances, DFA et al. wrote, milk procurement area and producer price equity became the integral, more important factor because of the need to stabilize the milk supply for plants with route distribution in multiple marketing areas. As a whole, DFA et al. viewed the first alternate proposal as the best amendment to resolve the issue and, if the Department did not recommend Superior Dairy's alternative proposal, suggested that Proposal 1 as originally noticed be adopted.

A post-hearing brief was filed on behalf of Land O'Lakes, Inc., Agri-Mark, Inc., Maryland and Virginia Milk Producers Cooperative Association, Inc., and St. Alban's Cooperative Creamery, Inc., (Northeastern Cooperatives), in support of Proposal 1. The Northeastern Cooperatives are member–owned Capper Volstead cooperatives that pool their producer's milk on numerous FMMOs. The brief reiterated the testimony of witnesses in support of Proposal 1 as originally noticed and reviewed current order provisions that distinguish where a plant is regulated based off of the plant's route disposition instead of the geographical location of the plant. The brief reasserted the testimony of a Superior Dairy witness who said that 28 percent of its route distribution was in the Northeast marketing area in comparison to 20 percent in the Mideast marketing area.

The Northeastern Cooperatives brief opposed the alternate proposals offered by Superior Dairy at the hearing. The brief stated that alternate proposals should have been offered when the initial request for additional proposals was made so they could be included in the Notice of Hearing. The brief emphasized the Northeastern Cooperatives' opinion that the alternate proposals would lock-in Superior Dairy to regulation by the Mideast order, even if its route distribution was 25 percent or more into another Federal marketing area. The brief stressed that implementation of a supposed lock-in provision would be of economic benefit to Superior Dairy, not producers.

The Northeastern Cooperatives brief also stressed that the alternative Superior Dairy proposal would not require a plant to meet the 25 percent in-area route disposition standard, even though the plant would become regulated by the Mideast order. The brief emphasized that it is important to always consider route disposition as a factor when determining the FMMO in which a plant should be regulated.

SMA filed a post hearing brief reiterating that disorderly marketing conditions are occurring as a result of inadequate Pool Plant provisions. SMA, in brief, offered their support to the modifications of Proposal 1 advanced by Superior Dairy during the hearing as a method for alleviating the disorderly marketing conditions. The brief noted that the disorder results from the disruption of uniform pricing, the switching of the regulatory status of plants from one order to another, the improper pooling assignment of reserve supplies, and the uneconomic movements of milk. SMA, in testimony and in written brief, urged the Department to consider the matter under emergency procedures, asserting that confidence in the Federal milk marketing order pricing system could otherwise be compromised.

A post-hearing brief submitted on behalf of Superior Dairy reiterated many of the points made at the hearing and recommended adoption of the first modification it had offered at the hearing. Superior Dairy asserted that their modified proposal would lock-in the Superior Dairy Canton plant as a Mideast pool plant by virtue of its geographic location notwithstanding its failure to meet the 25 percent in-area route distribution qualification. The brief stated that the purpose of the amendment was to regulate Superior Dairy as a pool plant under the terms of the Mideast order regardless of whether or not it also qualified as a pool plant in any other order. The brief summarized that the modified proposal sets as qualification standards (1) distribution and transfers of 50 percent or greater of a plant's fluid milk products into Federal milk marketing areas, and (2) plant location within the Mideast marketing area. Superior Dairy wrote that adoption of modified Proposal 1 would ensure the marketwide pooling of revenue for all producers and give Superior Dairy regulatory stability.

In brief, Superior Dairy acknowledged that shifts in plant regulation create disruption and challenges in producer pooling and milk supply coordination. The brief also acknowledged that partially regulated plants such as Superior Dairy enjoyed certain advantages over fully regulated plants as they had price advantages in the procurement of raw milk. The brief explained that because distributing plants have a high Class I utilization, producers supplying the PRDP will always receive a higher price than those serving fully regulated distributing plants, who in turn receive the order's minimum blend price. Consequently, the brief noted, producers serving the PRDP do not equitably share in the burden of balancing the market's milk supplies.

Superior Dairy's brief continued to refute the information provided by the DFA et al. witness regarding pricing assumptions and Superior Dairy's purported raw milk cost advantage. Superior Dairy stated that a price advantage did exist to them from being partially regulated; however, the calculation of that advantage as provided by DFA et al. was overstated.

Discussion and Findings

At issue in this proceeding is the consideration of proposed amendments to the Mideast FMMO Pool Plant provisions to more adequately define the plants that should be fully regulated by the terms of the Mideast order. This decision recommends that the Pool Plant provisions be amended to reflect that distributing plants located within the marketing area with a Class I utilization of at least 30 percent and with combined route disposition and transfers of at least 50 percent into Federal milk marketing areas would be regulated as a pool distributing plant under the terms of the Mideast marketing order (not withstanding other order provisions as discussed below).

The Pool Plant provisions of the Mideast order[2] define how plants demonstrate an adequate association with the fluid market, and subsequently how the milk associated with those plants is pooled and priced under the terms of the order. There are several types of plants defined in the Pool Plant provisions. This decision recommends a change to the definition of a Pool Distributing Plant (a plant that processes milk for fluid uses).

The Pool Distributing Plant standard[3] of the Mideast order first requires a plant to demonstrate an adequate association with the fluid market by meeting a minimum Class I utilization. This is determined by the percentage of fluid milk physically received at the plant that is distributed or transferred as Class I (fluid) products. The Class I utilization standard for the Mideast FMMO is 30 percent. The plant must also show a reasonable association with the order's Class I market; that association is determined by the percentage of the plant's total Class I route disposition that is distributed or transferred within the marketing area, or "in-area" route disposition. In the Mideast order, a plant is fully regulated if at least 25 percent of its Class I route disposition and transfers are within the Mideast marketing area. If a plant meets both the 30 percent Class I utilization standard and the 25 percent in-area route distribution standard (termed the "30/25 percent standard"), the plant is fully regulated as a distributing plant under the terms of the Mideast order. Once fully regulated, a pool distributing plant must account to

[2] 7 CFR 1033.7
[3] 7 CFR 1033.7(a)

the marketwide pool at classified use values and is required to pay its producers at least the order's minimum blend price. This process ensures that similarly situated handlers have the same minimum raw milk costs and that the dairy farmers supplying the market share in the revenue generated from all fluid milk sales within the marketing area.

FMMOs rely on the tools of classified pricing and marketwide pooling to assure an adequate supply of milk to meet the market's fluid needs and to provide for the equitable sharing of the revenues arising from the classified pricing of milk. Classified pricing assigns a value to milk according to how the milk is used; Class I (fluid) generally being the highest, followed by Class II (soft products), Class III (cheese), and Class IV (butter and nonfat dry milk). Regulated handlers who buy milk from dairy farmers account to the order's marketwide pool at classified prices according to how they use the milk. Dairy farmers are then paid a weighted average or ‘‘blend’’ price. The blend price is derived through the marketwide pooling of all class uses of milk in a marketing area, thus each producer receives an equal share of each use class of milk and is indifferent as to what class their milk is used. Since it is primarily the higher-valued Class I use of milk that adds additional revenue to the marketwide pool, it is reasonable to expect that the producers who consistently bear the costs of supplying the market's fluid needs should be the ones to share in the returns arising from higher-valued Class I sales.

FMMOs have unique provisions for handlers that have route distribution into a marketing area but do not meet the standards for full regulation under the terms of the order. A handler that does not meet the minimum standard for full regulation under a specific FMMO (30/25 percent in the Mideast FMMO) but has route disposition within that marketing area and therefore competes with other fully regulated handlers for their Class I sales is known as a Partially Regulated Distributing Plant (PRDP). USDA has determined that some minimum regulation of

PRDPs is necessary to maintain orderly marketing conditions and ensure that the order's classified pricing and marketwide pooling provisions are not undermined.

There are three regulatory schemes, which may require a PRDP to account for route disposition into a marketing area: 1) A PRDP may pay into an order's PSF the difference between the Class I price and the market's blend price on its route disposition within the marketing area; 2) The PRDP pool obligation is calculated as if the plant were fully regulated and this obligation is compared to what the PRDP actually paid its milk suppliers in aggregate. If the obligation is greater than what it actually paid, the PRDP must pay the difference to the order's PSF. If the pool obligation is less than what the PRDP actually paid to its milk suppliers, then no additional payment to the order's PSF is necessary. This is often referred to as the "Wichita Option;" or 3) If a PRDP is subject to a State order with classified pricing and marketwide pooling, then it must pay into the order's PSF the difference between what it was required to pay into the State order and the applicable Class I price at the PRDP's location. An administrative assessment is collected by the Market Administrator regardless of which payment scheme the PRDP falls under and whether or not a payment into the PSF is required.

The proponents of Proposal 1 requested this rulemaking proceeding based on their opinion that the current Pool Plant provisions of the Mideast FMMO have allowed a plant with significant route distribution throughout the Mideast and other Federal marketing areas to become a PRDP, which in turn has resulted in disorderly marketing conditions. The proponents described, in their hearing testimony and post-hearing brief, a situation where Superior Dairy, which had previously been fully regulated by either the Northeast or Mideast orders, was able to circumvent full regulation by either order.

The proponents provided great detail as to how a loophole in the Pool Plant provisions has allowed a large plant with significant fluid milk sales into Federally regulated areas to avoid full regulation on any Federal order and outlined the market disorder this has created: 1) Similarly situated handlers who compete for fluid milk sales within the marketing area are no longer assured that they pay the same minimum prices for raw milk; and 2) Producers who service the order's Class I market are no longer sharing in all the proceeds from the order's Class I sales. The proponents argued that if this loophole is not closed, other handlers with more than one distributing plant could set up similar distribution patterns between their plants to also avoid full regulation.

Along the same line, the SMA witness described a third disorderly marketing condition, the improper pooling of reserve milk supplies. This witness described a situation where reserve supplies associated with a plant can lose association with the order's marketwide pool as a result of a plant being able to change regulation between orders with different pooling standards.

The Superior Dairy witness testified at the hearing that newly-patented filling and packaging technologies used at their bottling facilities have given them a competitive advantage in the marketplace and as a result, the ability to expand their distribution into numerous Federal marketing areas. According to the Superior Dairy witness, after expanding their route disposition into the Northeast marketing area in April 2010, they became a fully regulated handler in the Northeast order. Superior claims that they quickly found regulation on the Northeast order to be financially difficult to sustain because the Northeast order blend price payable to producers at the Canton location was lower than the Mideast order blend price at the same location by an average of $0.13 per cwt. The Superior Dairy witness testified that in early 2011 it purchased a small distributing plant in Wauseon, Ohio which allowed it to adjust its distribution patterns between the two plants so that the Canton plant was no longer regulated by any Federal order.

At the hearing, Superior Dairy offered two alternate modifications to Proposal 1. In their post-hearing brief, Superior Dairy supported adoption of their first modification which would fully regulate any distributing plant physically located within the geographic boundary of the Mideast marketing area if its total fluid route disposition into all Federal orders was greater than 50 percent. This modification would eliminate the stipulation, contained in Proposal 1 as originally noticed, that a plant's sales within any individual marketing area had to be less than 25 percent of its total route distribution.

The pooling standards of a FMMO are represented in the Pool Plant, Producer, and the Producer Milk provisions. Performance based pooling standards provide the only viable method to identify the milk of those producers who service the Class I needs of the market and therefore determine those eligible to share in the marketwide pool. If a pooling provision does not reasonably accomplish this end, the proceeds that accrue to the PSF from the market's fluid milk sales are not equitably shared with the appropriate producers. The result is the unwarranted lowering of returns to those producers who actually incur the costs of servicing and supplying the needs of the fluid milk market and the reserve supplies that are necessary to ensure that fluid demands are met.

The hearing record reflects, and this decision finds, that the current Mideast Pool Plant provisions (7 CFR 1033.7) do not adequately define the plants and the producer milk associated with those plants, which serve the needs of the fluid milk market and should therefore share in the additional revenue arising from fluid milk sales. The hearing record reflects that disorderly marketing conditions arise when a handler that has significant route distribution into Federally regulated areas is able to avoid regulation by altering its distribution patterns. FMMOs, through the fundamental tools of classified pricing and marketwide pooling, serve to minimize disorderly marketing conditions like the ones presented in this proceeding. A plant's ability to avoid regulation by altering its distribution pattern undermines the classified pricing and marketwide pooling fundamentals that are essential in maintaining orderly marketing.

FMMOs require that distributing plants meeting the Class I utilization and in-area route distribution standards be fully regulated under the terms of the appropriate order. Along the same line, plants with minimal sales into a regulated area and therefore minimal impact on the market fall under partial, not full, regulation. The record reflects that prior to March 2011 Superior Dairy was fully regulated by either the Mideast or Northeast order. Superior Dairy revealed at the hearing that it was the purchase of the Wauseon, Ohio, distributing plant and the subsequent change in distribution patterns between the two plants that enabled the Canton, Ohio, plant to become a PRDP, not because its overall milk sales decreased to a volume where it no longer had an association with the fluid market. In fact, the record shows that Superior Dairy's Class I utilization has remained around 80 percent regardless of its regulatory status and 90 percent of its sales are into regulated Federal milk marketing areas.

The Ohio region where Superior Dairy's plants are located is in relative proximity to five other Federal milk marketing area boundaries. This unique location lends opportunity to adjust route disposition to avoid meeting the in-area route standard of any one Federal order.

The record reflects that Superior Dairy utilizes the "Wichita Option" to account for its Class I sales into regulated areas. This choice allows the Canton plant to operate as an individual handler pool. Superior Dairy's operation as an individual handler pool, after having been regulated continuously for decades as a fully regulated distributing plant with a significant volume and an overwhelming majority of its Class I sales into Federally regulated areas, undermines the order's classified pricing and marketwide pooling system - essential principles for orderly marketing and competitive equity. Additionally, handler equity, which the FMMO system strives to maintain, can be evaluated on two fronts: where handlers compete in route distribution and where handlers compete in milk procurement. Both factors are important. However, when the balance of competition is disrupted through uneconomic movements of milk, one factor may become more important in order to restore competitive equity amongst competing handlers.

The classified pricing system ensures regulated handlers that their competitors are paying uniform minimum raw milk costs. In this way, no competitor has an advantage or disadvantage in its raw milk costs because of its regulatory status. While a fully regulated handler must account to the pool for its classified use value and pay its producers the market's blend price, a PRDP using the "Wichita Option" - as in the case of Superior Dairy - must only show that it paid its producer suppliers, in aggregate, the classified use values of its raw milk supply. A PRDP operating essentially as an individual handler pool that has a higher in-plant Class I utilization than the market has a competitive advantage when it comes to raw milk procurement over a regulated competitor since it is able to pay its suppliers a higher in-plant blend price. At the hearing, a Superior Dairy witness testified that their Class I utilization was approximately 82 percent. The Class I utilization for the Mideast order in October 2011 (the month the hearing was held) was 38.1 percent. Superior Dairy's raw milk cost advantage due to its partially regulated status is equal to the difference between the in-plant blend price and the market's blend price. This is revenue that a fully regulated handler would have been required to pay into the order's PSF to be shared with all the market's producers, but which Superior has available to pay directly to its producers because of its partially regulated status.

Additionally, because Superior Dairy can include over-order premiums as part of the calculation relied on to prove to the Market Administrator under the "Wichita Option" that minimum classified prices are being paid, similarly situated handlers are not guaranteed the same raw milk costs. The record reflects that the payment of over-order premiums is prevalent in the Mideast marketing area. While a regulated handler must pay the order's minimum blend price plus any over-order premium they have negotiated with its suppliers, a PRDP is able to use the over-order premium to offset its regulatory PSF payment obligation to its suppliers. For example, assume a prevailing over-order premium of $2.00 per cwt on all Class I milk is charged by cooperatives servicing distributing plants and the order's Class I price for the month is $19.00 per cwt. A fully regulated handler would account to the PSF at $19.00 per cwt for any Class I milk utilized, and pay the additional over-order premium of $2.00 per cwt directly to the cooperative – meaning that they are actually paying $21.00 per cwt for Class I milk. A PRDP can include the $2.00 per cwt over-order premium paid directly to its suppliers when calculating whether it has an additional pool obligation under the "Wichita Option." In effect, the PRDP pays $19.00 per cwt while the fully regulated plant must pay $21.00 per cwt. This theoretical $2.00 per cwt advantage can be used by the plant in any way it deems fit: to procure additional milk suppliers, to pass the money on to its suppliers, to create a sales advantage over its competitors, or to simply keep as company profit.

This decision also finds that marketwide pooling principles are undermined because of Superior Dairy's PRDP status. It is clear that Superior is able to retain monies that it otherwise would pay into the PSF if it were fully regulated. The hearing record reflects attempts by proponents to estimate Superior Dairy's cost advantage, and taken a step further, monies that would otherwise be paid into the marketwide pool. In its post-hearing brief, Superior Dairy refutes some of the proponents' assumptions and argues that its cost advantage is lower. Estimating the exact amount of Superior Dairy's purported cost advantage gained by avoiding full regulation is difficult without disclosing confidential business information; furthermore, determining the exact level of that advantage is not necessary to demonstrate its existence and consequent market disorder. What is important is that money is not being equitably shared with all producers supplying the Class I market. Even if Superior Dairy was sharing that money with all its producer-suppliers, it is money that should be shared with all producers servicing the market. Consequently, producers serving the market are receiving a lower blend price than they otherwise would if Superior Dairy were fully regulated.

This decision recommends the adoption of Proposal 1 as modified by Superior Dairy as an appropriate solution to the current market disorder. While FMMOs typically regulate (pool) plants based on where their fluid milk sales occur, the hearing record reflects that it is not unprecedented for a plant to be regulated based on competing milk procurement areas. A 1988 decision (53 FR 14804), for example, regulated a plant into the then Louisville-Lexington-Evansville FMMO, despite the plant having greater route disposition into another FMMO. This finding was based on the fact that despite having greater sales into another FMMO, the raw milk procurement area of the plant was the same as other handlers who were regulated by the Louisville-Lexington-Evansville FMMO.

Additionally, all Federal orders contain provisions to regulate plants that primarily process ultra-high temperature or ESL milk products in the Federal order where the plant is physically located. Plants producing longer shelf-life products are regulated by the order where they are physically located[4] primarily because the wide and ever changing geographic distribution patterns of their products can lead to regulation under multiple orders over time. This is not unlike Superior Dairy, who distributes product into seven marketing areas.

The record reflects that Superior Dairy's Canton, Ohio plant is located in the middle of the Mideast marketing area and competes for a raw milk supply with other pool distributing plants that are regulated by the Mideast order. Furthermore, the record reflects that while Superior Dairy has been able to stay below the 25 percent in-area route distribution standard in other marketing areas, its route distribution into some Federal marketing areas exceeds 20 percent. Given that the plant has route distribution into 7 marketing areas, a 25 percent route distribution threshold could cause future market disorder if the plant shifts regulation from one order to another. Therefore, this decision finds it appropriate under the facts presented at this hearing to more heavily rely on milk procurement area, not route disposition, as the fundamental determinant in recommending changes to the Pool Plant provisions of the Mideast FMMO. Consequently, this decision recommends that distributing plants physically located in the Mideast marketing area who do not meet the 25 percent in-area route distribution standard (the current pooling standard for distributing plants to be regulated by the Mideast order), but do have a majority (50 percent or more) of their fluid milk sales into Federally regulated areas, be regulated by the Mideast order.

In their post-hearing brief, Superior Dairy reiterated its opinion that a modified Proposal 1 would "lock-in" the Superior Canton plant into regulation under the Mideast order, regardless of future route distribution patterns. However, FMMO's contain a provision in each order (§1033.7(h)(3)in the Mideast order) which specifies that if a pool plant has route disposition

[4] 7 CFR 10__.7(b)

greater than 50 percent into another Federal order for at least 3 consecutive months then that plant will become regulated by that Federal order. This decision does not amend that provision. If at any time a pool plant regulated by the Mideast order has route disposition of greater than 50 percent into another Federal order for 3 or more consecutive months, that plant would then become regulated by the order where it has a majority of its sales.

Superior Dairy argued in their post-hearing brief that a different provision contained in each order, (§1033.7(h)(5) in the Mideast order) could be relied upon to "lock-in" Superior Dairy to the Mideast order. This provision allows the Mideast order to regulate a pool plant even if it meets the pooling standards of another order – essentially it allows the Mideast regulations to trump another order's regulations if the plant is "required" to be pooled by the Mideast order. Although this decision recommends changes to the Pool Plant provisions of the Mideast order based on clear evidence of disorderly marketing conditions resulting from the partial regulation of Superior Dairy and relies heavily on milk procurement area as one of the reasons behind this change, this decision does not "lock-in" or require Superior Dairy, or any other handler, to be regulated by the Mideast FMMO. This decision simply modifies the Pool Plant provisions so that any plant located in the Mideast marketing area that does not meet the in-area route distribution standard, but has at least 50 percent of its total route distribution into Federal marketing areas, becomes regulated under the Mideast order. To be clear, a situation could arise where a plant physically located in the Mideast marketing area meets the in-area route distribution standard of another order but is still regulated on the Mideast order. However, as current regulations already provide for, any plant located in the Mideast marketing area that has more than 50 percent of its route distribution into another Federal order for 3 consecutive months would still become regulated by that other Federal order.

Lastly, in their post-hearing brief the Northeast Cooperatives took exception to the two modified proposal options offered by Superior Dairy. The Northeast Cooperatives were of the opinion that the two modified proposals presented at the hearing were not properly noticed and that interested parties did not have the opportunity to offer evidence regarding the modifications. This decision finds that the modifications offered by Superior Dairy at the hearing were in fact reasonable given the scope of the initial hearing request and that all interested parties in all Federal orders were given notice and had ample opportunity to offer evidence at the hearing and comment in a post-hearing brief.

Proponents and supporters of the originally noticed Proposal 1 requested that the Department consider this proceeding on an emergency basis because of the ongoing market disorder. The Department finds that issuing a decision on an emergency basis is not warranted. This decision recommends adoption of Proposal 1 as was modified at the hearing. It is appropriate to give all interested parties the opportunity to consider the Department's findings and file written comments and exceptions to this decision before requesting producers to vote on the order, as amended. Additionally, this rulemaking will adhere to the Supplemental Rules of Practice that were issued as a result of the Food, Conservation and Energy Act of 2008 (as contained in 7 CFR part 900.20-.33). These newly established rules provide specific timeframes that the Department must adhere to when amending Federal milk marketing agreements and orders. Therefore, there is insufficient justification for issuing this decision on an emergency basis as the market disorder can still be addressed in a timely manner while allowing for maximum public input before any regulatory changes are made.

AMS has made a conforming change to the regulatory text as offered by Superior Dairy and as recommended for adoption in this decision. The reference to the 30 percent Class I utilization standard that is already contained in the Pool Distributing plant definition has been added to the proposed amendment. This addition clarifies that a pool plant physically located in the Mideast marketing area that meets the 50 percent route disposition into Federally regulated marketing areas must still meet the 30 percent Class I utilization standard in order to be regulated on the Mideast order.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings, and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Mideast order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for the milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreement upon which a hearing has been held.

(d) All milk and milk products handled by handlers, as defined in the tentative marketing agreements and the orders as hereby proposed to be amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

Recommended Marketing Agreement and Order Amending the Order

The recommended marketing agreement is not included in this decision because the regulatory provisions thereof would be the same as those contained in the order, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in the Mideast marketing area is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Part 1033

Milk marketing orders.

For the reasons set forth in the preamble, 7 CFR part 1033, is proposed to be amended as follows:

1. The authority citation for 7 CFR part 1033 continues to read as follows:

Authority 7 U.S.C. 601-674, and 7253.

PART 1033 – MILK IN THE MIDEAST MARKETING AREA

2. Amend § 1033.7 by revising paragraph (a) to read as follows:

§ 1033.7 Pool Plant

* * * * *

(a) A distributing plant, other than a plant qualified as a pool plant pursuant to paragraph (b) of this section or §_____.7(b) of any other Federal milk order, from which during the month 30 percent or more of the total quantity of fluid milk products physically received at the plant (excluding concentrated milk received from another plant by agreement for other than class I use) are disposed of as route disposition or are transferred in the form of packaged fluid milk products to other distributing plants. At least 25 percent of such route disposition and transfers must be to outlets in the marketing area. Plants located within the marketing area that meet the 30 percent route disposition standard contained above, and have combined route disposition and transfers of at least 50 percent into Federal order marketing areas will be regulated as a distributing plant in this order.

* * * * *

Dated: February 24, 2012

Robert C. Keeney

Acting Administrator

Agricultural Marketing Service

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